Voon Keng & Ors v Syarikat Muzwina Development Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22-164-89
ABDUL MALEK J
14 FEBRUARY 1990

Land Law — Damages for late delivery — Injunction to restrain vendors from obtaining moneys from stakeholders — Danger of dissipation of assets

Civil Procedure — Representative action — Various plaintiffs having different interests in matter — Whether action could be maintained — Rules of the High Court 1980, O 15 r 12

Civil Procedure — Injunction — Vendors restrained from obtaining moneys from stakeholders — Danger of dissipation of assets — Whether injunction should be set aside

The plaintiffs obtained an injunction to restrain the defendants by their servants or agents or otherwise from receiving moneys to the extent of $498,733.20 from various entities who were withholding the last 5% or thereabouts of the purchase price of houses built by the defendants. The plaintiffs' claim was for agreed statutory damages for late delivery and refund of interest paid due to premature release of moneys at the request of the defendants' architect. Further the plaintiffs claim that there was a real risk that the defendants may seek payment before judgment could be obtained. The defendants then applied to set aside or vary the injunction and claim damages and costs.

Amongst the arguments raised by the defendants were that the first plaintiff had no authority to file the claim for 60 other plaintiffs; that the plaintiffs could only apply to restrain the defendants from receiving the stakeholders' fund of the relevant plaintiffs whose money was with the stakeholders; and that the injunction caused hardship to the defendants as the stakeholders had refused to pay any money to the defendants resulting in them not being able to proceed with further construction work.

Held, dismissing the defendants' application but varying the injunction:

(1) Order 15 r 12 of the Rules of the High Court 1980 clearly states that when numerous persons have the same interests in any proceedings, not being proceedings concerning the administration of the estate of a deceased person, property subject to a trust, or the construction of a written instrument, including a statute, in which situations different considerations apply, they may be begun, and unless the court otherwise orders, continued by or against any person or more of them as representing all or as representing all except one or more of them. The plaintiffs were members of the same class, had a common grievance and the relief sought was in a nature beneficial to all whom the plaintiffs represented and the representative action could therefore continue.

(2) There was no reason why all the six entities had to be restrained from handing over to the defendants the sum of $498,733.20 as to the plaintiffs' claim was not yet adjudicated upon. As the plaintiffs' claim for liquidated damages is only 5% of the purchase price, they are not entitled at this stage to the whole amount of $498,733.20 and it is only for the defendants to pay the difference to the plaintiffs after the alleged amounts have been ascertained at a trial.

(3) There was no evidence of a risk of dissipation of assets where the defendants who in carrying out this housing project had in fact had no problems with over 200 purchasers. Restraining payment of moneys due from the six entities in excess of the stakeholders' amounts would have the effect of a slow down in activities and a possibility of a complete standstill in operations making it more difficult for the defendants to pay damages for late delivery.

(4) The injunction should not be totally set aside but it should be varied to the extent that each entity should only keep 5% of the purchase price for each purchaser plaintiff whose stake is with them.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02-46-90.]

Cases referred to

1 *Duke of Bedford* v *Ellis & Ors* [1901] AC 1 (refd)
2 *Smith & Ors* v *Cardiff Corp* [1954] 1 QB 210 (refd)
3 *Markt & Co Ltd* v *Knight Steamship Co Ltd* [1910] 2 KB 1021 (refd)
4 *Atip bin Ali* v *Josephine Doris Nunis & Anor* [1986] 1 CLJ 320 (not folld)
5 *SEA Housing Corp Sdn Bhd* v *Lee Poh Choo* [1982] 2 MLJ 31 (folld)
6 *Loh Wai Lian* v *SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1 (folld)
7 *Kandasamy a/l Sreenivasagam* v *Syarikat Muzwina Development Sdn Bhd* [1990] 1 MLJ 15 (folld)

Legislation referred to

Rules of the High Court 1980 O 15 r 12(1), O 29 r 1(a)

Lalchand Nathermal for the plaintiffs.
LA Gomes for the defendants.

Cur Adv Vult

Abdul Malek J: The plaintiffs had applied, by way of an ex parte summons-in-chambers filed on 15 June 1989, for the following orders:

(a) that the defendants by their servants or agents or otherwise howsoever be restrained from receiving moneys to the extent of $498,733.20 from:

(1) Hock Hua Bank Bhd, G-14, Jalan Sultan Idris Shah, Bangunan Sri Kinta, Ipoh;

(2) Kean Chye & Sivalingam, Advocates & Solicitors, 8-10, 1st Floor, Jalan Station, Ipoh;

(3) Cheang Lee & Ong, Advocates & Solicitors, No 13, Jalan Bandar Raya, Ipoh;

(4) CW Chew & Co, Advocates & Solicitors, Room 303, 3rd Floor, Bangunan Sri Kinta, Jalan Sultan Idris Shah, Ipoh;

(5) Coopers & Lybrand, Level 9, Wisma Maju UMNO, Jalan Sultan Idris Shah, Ipoh; and

(6) Abbas & Ngan, Advocates & Solicitors, No 33-D, 3rd Floor, Jalan Bandar Raya, Ipoh.

and that the said sum be withheld by these entities until judgment in this matter whereupon the same shall be paid to the plaintiffs or their solicitors;

(b) that sealed copies of this order be served on the defendants and the six entities affected herein;

(c) that the entities affected by this order do disclose to this court and solicitors for the plaintiffs the total amount withheld by them and payable to the defendants within seven days of the service of this order on them;

(d) that parties be at liberty to apply generally; and

(e) costs in the cause.

The application had been granted the same day upon a certificate of urgency. The facts deposed to by the first plaintiff in the supporting affidavit which he had made on behalf of all the other plaintiffs were that:

(a) all the plaintiffs were purchasers of the houses built by the defendants;

(b) they had filed a claim for $498,733.20 against the defendants the details and particulars of which were in the statement of claim;

(c) their claims were for agreed statutory damages for late delivery of their houses and refunds of interest paid due to premature release of moneys at the request of the defendants' architect:

(d) the defendants had not made any payments which suggested that they were trying to delay or avoid payments; and

(e) there was a real risk that the defendants may seek payment of these moneys from the six entities concerned before judgment could be obtained.

The statement of claim had pleaded that:

(a) the houses should have been completed and vacant possession delivered to the plaintiffs within 24 calendar months from the date of the respective bookings or agreements, whichever is earlier, failing which liquidated damages from day to day at 10% per annum of the purchase price was payable to the plaintiffs;

(b) the defendants had provided the certificate of fitness for occupation by letter dated 10 August 1988 with a letter to the Lembaga Letrik Negara for the supply of electricity to the respective houses;

(c) the date of delivery of vacant possession in law is the date of electricity supply;

(d) the defendants' architect had by a certificate dated 14 January 1988 certified that the houses were constructed to the stage for vacant possession and connection of water and electricity supply as at that date;

(e) in consequence, the plaintiffs' financiers had prematurely released the final loan amount to the defendants and stakeholders causing the plaintiffs to pay interest at 10% per annum prematurely and depriving them of their rights to set off or a major portion of their claim against the defendants;

(f) electricity supply was on 10 August 1988; and

(g) the six entities were withholding the last 5% or thereabouts of the purchase price as follows:

(i)	Hock Hua Bank Bhd, Ipoh	— for plaintiff No 30
(ii)	Kean Chye & Sivalingam	— for plaintiffs No 14, 24 and 46
(iii)	Cheang Lee & Ong, Ipoh	— for plaintiff No 15
(iv)	CW Chew & Co, Ipoh	— for plaintiff No 22
(v)	Coopers & Lybrand, Ipoh	— for plaintiff No 59
(vi)	Abbas & Ngan, Ipoh	— for all the remaining plaintiffs.

Annexed to the statement of claim were details of the plaintiffs, lot numbers purchased, dates of booking, purchase price, dates of agreement, dates of legal completion of houses, dates of premature final release, amounts of final release, date of delivery of supply of electricity, periods of delay, periods of premature release and total amounts due. 35 of the plaintiffs had purchased houses priced at $40,000, one at $41,000, 22 at $42,500, two at $50,875 and one at $56,125. The total to be restrained from being received by the defendants was $498,733.20.

By a summons-in-chambers filed on 14 July 1989, the defendants sought to set aside or vary the order given on 15 June 1989 and for damages and costs. After a number of adjournments to enable either one party or the other to file an affidavit in reply, the matter was finally heard on 29 December 1989. On 19 January 1990, I dismissed the application but ordered that the sum to be retained by each of the six entities should only be 5% of the stakeholder's amount for the relevant plaintiff whose money is with them. The senior assistant registrar was also directed to assess damages, if any, occasioned by the variation of the said order. It is against this decision that the plaintiffs have now appealed.

The arguments advanced by learned counsel for the defendants were that:

(a) the first plaintiff had no authority to file the claim for the 60 other plaintiffs;

(b) the claim for $498,733.20 was highly exaggerated considering the different dates of the sale and purchase agreements, the fact that no deduction was made for the interest on the late payment of the progress payments and for the commitment fees payable by the plaintiffs to the financiers, and that the plaintiffs had taken the wrong dates for the supply of electricity and for the dates of completion;

(c) the plaintiffs could only apply to restrain the defendants from receiving the stakeholder's fund of the

relevant plaintiffs whose money was with one of the six entities;

(d) the order on 15 June 1989 was causing hardship to the defendants as all the six entities had refused to pay any money to the defendants resulting in them not being able to proceed with further construction work;

(e) Order 29 r 1(a) of the Rules of the High Court 1980 (hereinafter 'the Rules') had not been complied with as the injunction was not in Form 58;

(f) the plaintiffs had admitted that there were two triable issues, namely, whether the booking dates can be the dates of the agreements and whether interest should be paid on the premature release of the final amount; and

(g) the signatures of the remaining plaintiffs on the list and in the agreements were not the same.

On the first point, I disagreed with learned counsel for the defendants as O 15 r 12(1) of the Rules clearly states that where numerous persons have the same interest in any proceedings, not being proceedings concerning the administration of the estate of a deceased person, property subject to a trust, or the construction of a written instrument, including a statute, in which situations different considerations apply, they may be begun and, unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In the *Duke of Bedford* v *Ellis & Ors*,[1] the House of Lords had held, where several plaintiffs had sued, on behalf of themselves and all other growers of fruit, flowers, vegetables, roots and herbs within the meaning of the Covent Garden Act 1828, to enforce various preferential rights to stands in the market which they alleged to have been given to their class of growers by the Act, against the defendant who was the lord of the market, that without prejudging the construction of the Act, the plaintiffs had an interest in common and that the defendant was not entitled to have the action stayed either on the ground that the plaintiffs had no beneficial proprietary right or that the joinder of plaintiffs claiming separate and different rights under the Act, both personally and as representing a class, would embarass or delay the trial. This case was distinguished in *Smith & Ors* v *Cardiff Corp*,[2] where the facts were that the defendant, a local authority, had decided that in order to fulfil their financial obligations under the Housing Act 1936 they had to increase the rents payable by the tenants not uniformly but upon a differential basis according to the income of the defendants resulting in the lower paid ones not suffering any increase. Four of the tenants sued on their behalves and that of the other tenants claiming that the increase was ultra vires. It was held on appeal that to bring a representative action under O 16 r 9 of the English Rules of the Supreme Court (on which our O 15 r 12 is based), it must be shown that all the members of the class had a common interest, that they had a common grievance and that the relief was in its nature beneficial to them all. On these facts, the court found, quite correctly I might add, that the second and third qualifications had not been fulfilled and held that the action could not proceed as a representative action but as an action brought by four individuals.

In *Markt & Co Ltd* v *Knight Steamship Co Ltd*,[3] the plaintiffs had shipped goods on a general ship belonging to the defendants for a voyage from New York to Japan. However, both the ship and cargo were sunk by a Russian cruiser on the ground that the ship was carrying contraband of war. In their action, the plaintiffs sued on behalf of themselves and 44 other persons, firms and companies who had also shipped goods on board the ship. By a two to one majority, the court ruled that shippers of goods in a general ship could not have the same interest in one cause or matter and no representative action could lie where the sole relief sought was damages. This was followed in the local case of *Atip bin Ali* v *Josephine Doris Nunis & Anor*[4] where the court held that a representative action is not normally allowed to establish the right of numerous persons to recover damages as the sole relief claimed but then that was a defamation action and the finding certainly cannot be applied here.

In the circumstances of our present case, I was satisfied that the plaintiffs were members of the same class, had a common grievance and that the relief sought was in its nature beneficial to all whom the plaintiffs represented and the representative action could therefore continue although the amounts due to each of them may well be different in view of the different dates involved.

However, as pleaded in the statement of claim at para 9, the six entities are holding the last 5% 'or thereabouts' of the purchase price and para (b) of the prayers had asked that the said amounts be paid to the respective plaintiffs towards the account of the claims. As for para (a) of the prayers where the plaintiffs had prayed for the total sum of $498,733.20, this had yet to be adjudicated upon and I saw no reason why all the six entities had to be restrained from handing over to the defendants this sum if the amount that can be set off from the plaintiffs' claims for liquidated damages for late delivery of their houses should only be the 5% with the stakeholders. In fact, all the relevant correspondence exhibited by the first plaintiff in applying for the injunction had stated only the sum of $2,000 per purchaser as regards the stakeholder's fund which is correct for houses costing $40,000 although the list annexed to the statement of claim had given a number of purchase prices above the said amount. To my mind, the plaintiffs were only entitled to set off the stakeholder's amount proportionate to 5% of the purchase price and not the whole amount that they at this stage think they are

entitled to for late delivery of the houses. It is for the defendants to pay the difference to the plaintiffs only after the alleged amounts have been ascertained at a trial. The principle of set off in the circumstances had in fact been given judicial recognition in *SEA Housing Corp Sdn Bhd* v *Lee Poh Choo*,[5] *Loh Wai Lian* v *SEA Housing Corp Sdn Bhd*[6] and *Kandasamy a/l Sreenivasagam v Syarikat Muzwina Development Sdn Bhd*.[7]

There was also no evidence that there was a risk of dissipation of assets by the defendants who in carrying out this housing project had in fact had no problems with the other 200 odd purchasers. Moreover, restraining them from getting the moneys due from the six entities in excess of the stakeholder's amounts would have the effect of a slow down in their activities or possibly a complete standstill in operations making it more difficult for the defendants to pay any damages for late delivery.

In the circumstances, I dismissed the application to totally set aside the injunction but ordered that it should be varied to the extent that each entity should only keep 5% of the purchase price for each purchaser plaintiff whose stake is with them and directed the learned senior assistant registrar to assess damages, if any, sustained by either party by virtue of the variation. Each party was ordered to bear its own costs.

Order accordingly.

Solicitors: *Lalchand, Nawawi, Phang & Co; LA Gomes & Co.*

Reported by *Yap Shao Sin*